No. 11757

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TIDE WATER ASSOCIATED OIL COMPANY, a corporation,

Appellant,

vs.

DAVID LAWTON RICHARDSON and BETHLEHEM STEEL COMPANY, a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

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Foreword.

Appellee Bethlehem predicates its entire argument on three premises: (A) None of its employees was on board the vessel from 3:30 P. M., August 5, 1944, and the time of the accident on Sunday night; (B) the contract was not one of bailment; and (C) if it was negligent, such negligence was not a proximate cause of the injuries.

Appellee Richardson makes no attempt to answer appellant's specifications of error 3, 4, 5 and 6 and the opening argument thereon, confining himself to specifications 1 and 2. He claims that no argument was advanced by appellant in support of assignment number 6 and that he is willing to stand on the findings of fact and conclusions of law as signed by the trial judge. Specification number

6 refers to errors of the trial court in its findings of fact and conclusions of law and was most certainly argued in the opening brief (pp. 32-51).

Reply to Appellee Bethlehem.

Appellant does not agree with the assumptions of appellee Bethlehem in its "Summary of Argument." Appellant's points are as set forth in its opening brief. Bethlehem is the only party which could have been responsible for the removal of the safety equipment around the port bunker hatch, the *affirmative* act of raising it off the iron support-leg and leaning it against bulkhead, and leaving it unguarded and unlighted when its workmen *temporarily* left the job in an unfinished state at or about 3:30 P. M. on August 5, 1944. It is apparently the position of Bethlehem that if an independent contractor is employed to perform work on a vessel and in doing so *creates* a dangerous condition by *affirmative* action, the employer of the independent contractor is under a legal duty to erect barricades or illuminate the said danger each time there is a temporary absence of the contractor's servants. This is a novel contention. So novel, in fact, that Bethlehem's proctors were unable to cite a single authority in support thereof. Appellant refers to the following authorities:

Restatement of the Law of Torts, Vol. 2, Secs. 409-429;

Restatement of the Law of Torts, Vol. 2, Secs. 383-387;

Hall v. Barber Door Co., 218 Cal. 412, 23 P. (2d) 279;

Donahoo v. Kress House Moving Corp., 25 Cal. (2d) 237, 153 P. (2d) 349;

27 American Jurisprudence, Sec. 52, p. 530.

Bethlehem erects a straw man and gratuitously asserts that "Associated recognized that this appeal must fail unless this court believes, contrary to the trial court, that the FRANK G. DRUM was delivered to Bethlehem as 'bailee' for the repairs." (Beth. Br. p. 7.)

Appellant contends that there was a bailment for the purpose of repairs but if there was no bailment such conclusion would not result in any exoneration of Bethlehem. The authorities cited hereinabove and the case of *Crane Elevator Co. v. Lippert,* 63 Fed. 943, point conclusively to liability on the part of Bethlehem *if* appellee Richardson is entitled to recover damages from anyone.

It seems to appellant that there was a bailment for the purpose of general and specific repairs even though a "security watch" was maintained. The cases of *International etc. v. Fletcher,* 296 Fed. 855, and *Newport News etc. Co. v. U. S.,* 34 F. (2d) 100, support this view.

Appellee Bethlehem also ignores the rule that Associated, not having *created* any dangerous condition, is entitled to indemnity from Bethlehem. No overt act of negligence on the part of appellant is proved by the evidence. If, *which appellant denies,* it was responsible to Richardson, the basis of responsibility is that it did not put the area of the port bunker in the same condition as it was up to the time Bethlehem commenced the work. It is reasonably certain that if Bethlehem, upon temporarily leaving the uncompleted job, had replaced the hatch on the support and roped off the area, Richardson would not have fallen into the hatch. If there was any negligence in leaving the hatch open and unguarded, such negligence continued in unbroken sequence up to the instant of the

accident. Under these circumstances the rule of indemnity as set forth in 27 American Jurisprudence, page 467, section 18, is directly applicable.

Appellee Bethlehem contends that even though it created the dangerous condition it was under no duty to illuminate it at night. In the *Crane* case the court says:

> "Having placed obstructions in the hall, the duty rested upon the plaintiff in error to exercise reasonable care and prudence to protect from injury those having lawful occasion to use it, by means of *lights* or *other suitable safeguards*. This duty required the exercise of care and diligence on *its* part in proportion to the danger occasioned by the presence of these obstructions. It saw fit wholly to neglect the performance of this duty. It relied upon the lighting of the hall by the owner of the building as the sole means of protection against injury from these obstructions. Having intrusted to another the discharge of a *duty* resting upon *itself*, the plaintiff in error is responsible for a failure in its performance." (Emphasis added.)
>
> *Crane Elevator Co. v. Lippert,* 63 Fed. at 947.

In its extremity—being unable to answer the statements of the Circuit Court of Appeals in the *Crane* case—appellee Bethlehem says: "Since the suit was against the elevator company alone, the court found this concern negligent and liable to the injured boy." (Beth. Br. p. 11.) In other words, appellee Bethlehem advances the ridiculous contention that the only reason for the independent contractor being held liable was that the injured boy had not sued the owner of the building and therefore the court held the elevator company guilty of actionable negligence even though such holding was not justified under the law. The court did not hold that the "elevator company's duties

and responsibilities were co-extensive with those of the owner." (Beth. Br. p. 11.) But, if it did, Bethlehem would certainly be guilty of actionable negligence.

Bethlehem's unjustifiable position seems to be that it is not liable to either Richardson or Associated, pursuant to General Admiralty Rule 56, for the following reasons: 1. Although it caused the safety measures taken by Associated to be removed and left the hatch wide open, without any ropes or barricades, it cannot be liable because none of its employees was working on the vessel on Sunday night; and, 2, the "ship's officers," who saw the hatch open and knew the rope was not in place, did not close the hatch or rope it off. There is no evidence showing that Humble—the only deck officer aboard on Sunday—knew anything about the condition of the hatch. Frederick, the chief mate, left the vessel at approximately 3:30 P. M. on Saturday and did not return until Monday morning. He testified that the only night he observed that the hatch was open it was lighted. [Ap. 468.] He also testified that "as to this hatch, I didn't know whether they were coming back at 12 o'clock at night, 8 o'clock or any other time. All I *knew* was they had knocked off and left the hatch open and I assumed they were coming back to work that night." [Ap. 477.]

Frederick was not, individually or as an employee of Associated—if he was an employee—required to anticipate that the hatch was going to be left open, unguarded, unroped and unlighted by Bethlehem from 3:30 P. M. Saturday until Monday morning. Therefore, no knowledge of the condition can be brought home to Associated through Frederick.

The Captain had not been aboard the vessel for more than 30 hours before the time of the accident. [Ap. 489.] There is no testimony showing that Bengston knew that Bethlehem left the hatch open, etc., from 3:30 P. M. on Saturday until the time of the accident.

Humble, a mate, and Schleef, an engineer, were the only "officers" aboard the vessel on Sunday. Neither of them knew the condition of the hatch.

The evidence establishes without conflict that no employee of Associated removed the rope guard or opened the hatch. Therefore, those acts must have been done by or for Bethlehem. If there was any duty to close the hatch or to rope it off that duty rested exclusively on Bethlehem. Likewise, if there was any duty to illuminate the area, that duty would arise only because the condition of the open hatch was a dangerous condition. Whoever caused the dangerous condition would have the duty of roping it off or lighting it.

Bethlehem states: "The evidence did not prove *who* opened the hatch wide or *who* removed the rope." (Beth. Br. p. 9.) It is true that the *names* of the men who did these things are not in the record but the *only* reasonable inferences as to their identity is that they were employed by Bethlehem. The work that was done in the hatch couldn't have been accomplished without, in the first instance, removing these impediments. Bethlehem sent its superintendent aboard immediately upon the delivery of the vessel to the shipyard and he took charge of all the work.

"Q. Mr. Harrington, assume that, when this ship came into the yard of the Bethlehem Steel Company, the port bunker hatch was roped off and the cover was held at about a 45-degree angle by means of a stiff leg, and your men were going to perform work down in that bunker hatch consisting of installing the staging and doing lifting, *they* would open up the bunker hatch to permit them to get down into the hold, wouldn't they? A. Yes, sir." [Ap. 341.]

The only other entity which did anything about the port bunker tank, excepting Bethlehem, was a ship service company engaged by *Bethlehem* to gas-free the tank.

"Mr. McHose: The facts are that the California Ship Service was employed by the Bethlehem Company to do this work.

Q. The work is called for by the contract and it (Bethlehem) is to be *responsible?* Is that correct, Mr. Courtier? A. Yes, sir." [Ap. 387.]

Associated is not legally responsible for dangerous conditions caused by Bethlehem or its employees. It was under no legal duty to follow Bethlehem around the ship. It did not know when Bethlehem would return to the ship. The work was in progress but temporarily suspended at the time of the accident. If anyone is liable in damages Bethlehem is the candidate for that financial burden. Associated was guilty of no moral or legal wrong. It brought the ship in good and safe condition into Bethlehem's shipyard. It was under no *duty* to interfere with Bethlehem and did not do so.

Reply to Appellee Richardson.

The sum and substance of Richardson's brief is that he is satisfied to rest on the findings of fact, conclusions of law and the order overruling Associated's exceptions to the libel.

Appellant need not repeat the argument in Point II of its Opening Brief as to the insufficiency of the evidence to support the findings of "actionable negligence."

Appellant contends that Richardson was actually and solely responsible for his injuries. He should have requested that parts of the ship not intended to be used as passageways or as a means of getting from one point to another be illuminated or he should have obtained a flashlight or lighted a match. If a man is going to roam about a ship he should at least inform persons aboard about his intentions. Of course, he didn't have to be informed that the deck was absolutely dark because he knew that the moment he boarded the ship.

In *Hardie v. New York etc. Corp.,* 9 F. (2d) 545, a shipyard worker fell into an open coal hatch. The *ship* had *removed* the cover. In the case at bar the shipyard opened or caused the port bunker hatch to be completely opened and the ropes removed and left it in said condition. The Court says:

> "The case does not involve the ship, which left off the cover. The defendant had nothing to do with that and could not be at fault for it." (9 F. (2d) at 547.)

In the case at bar, this Court may also say:

> "The case does not involve the ship, which had nothing to do with opening the hatch or removing the ropes. Associated had nothing to do with that and could not be at fault for it."

The Court also said:

> "We say that it is beyond any reasonable limit to say that a man, familiar with possibilities, may trust himself to the darkness of a ship's deck, which he has not tried, and about which he knows nothing and can learn nothing without light. If he does, he must so feel his steps that each shall be safe; else he has plainly risked that it may find no footing." (9 F. (2d) 547-548.)

Appellee Richardson introduced, and is bound thereby, documentary evidence consisting of interrogatories addressed to Associated and answered by it. This evidence establishes, as between Richardson and Associated, the following facts: The members of the crew aboard the vessel were there merely as a security watch. They were Asa H. Humble, third mate; J. J. Schleef, chief engineer, and B. Bisnagna, bos'n. The vessel was withdrawn from navigation. The duty of each individual member of the standby crew while the S. S. Frank G. Drum was at the Bethlehem Steel Company's repair yards was to act as security watch. The vessel had been *delivered* to the Bethlehem Steel Corporation's repair yards for annual repairs and inspection and there was no reason for the security watch to inspect the same. There were no fire hazards aboard the vessel. All machinery was shut down. Employees of the shipyard are the only ones who knew the nature of the repairs or why the bunker hatch was uncovered. Why the bunker hatch into which Richardson fell was open and uncovered at 21:00 on August 6, 1944, can be answered only by the persons who opened the hatch and left it open, none of whom was in the employ of Associated. The vessel's crew had nothing to do with uncovering, or lighting or guarding or roping off the

bunker hatch while the vessel was in the shipyard for inspection and repair. There were no fixed lights on the S. S. Frank G. Drum that could have been used to illuminate the bunker hatch or surrounding deck area where Richardson fell. The ship had no portable lights that could have been used for this purpose. [Ap. 376-378.]

Conclusion.

Appellant has shown that it breached no duty owing to appellee Richardson. It did not create the dangerous condition. The dangerous condition was not in any part of the vessel designed or intended to be used as a passageway. There is no proof showing that any employee or agent or officer of Associated knew that appellee Richardson was going to come aboard the vessel on Sunday night or that at said time the port bunker hatch cover was off the hatch, the ropes absent or that the area was not illuminated or that Richardson intended to or that he was under any duty to traverse or attempt to traverse that particular part of the vessel. In the absence of such knowledge, or of any duty to Richardson, how could there arise any obligation on the part of the standby crew to read Richardson's mind or anticipate that he would do what he did?

If Bethlehem had recreated the safety measures taken by Associated—it *alone* knowing it's workmen were *not* coming back to the vessel from 3:30 P. M. Saturday until Monday—the accident would not have happened. If anyone should justly be called upon to pay damages to Richardson, Bethlehem is responsible because it caused the danger and left it unguarded. In spite of all the general statements as to lighting facilities and "ship's portable lights" a careful reading and analysis of all the

testimony on that subject will demonstrate that there is no evidence proving the availability of any electric outlet belonging to or a part of the vessel into which any "ship's portable light" *could* have been plugged for the purpose of illuminating the particular area. The fact that it was necessary for the shipyard's temporary light man to come aboard and rig up a temporary light after the accident is fairly conclusive evidence that none of the ship's equipment was designed for or suitable to that purpose.

Respectfully submitted,

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